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11 DONALD J. TRUMP

12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**

14 STEPHANIE CLIFFORD a.k.a.
15 STORMY DANIELS,

16 Plaintiff,

17 v.

18 DONALD J. TRUMP,

19 Defendant.

Case No. 2:18-cv-06893-SJO-FFM

**NOTICE OF MOTION AND
SPECIAL MOTION OF
DEFENDANT DONALD J. TRUMP
TO DISMISS/STRIKE COMPLAINT
PURSUANT TO ANTI-SLAPP
STATUTE OR, ALTERNATIVELY,
TO DISMISS COMPLAINT
PURSUANT TO FRCP 12(b)(6);
MEMORANDUM OF POINTS AND
AUTHORITIES**

[Declaration of Charles J. Harder Filed
Concurrently Herewith]

Assigned for All Purposes to the
Hon. S. James Otero

Date: September 24, 2018
Time: 10:00 a.m.
Location: 350 West 1st Street
Courtroom 10C, 10th Floor
Los Angeles, CA 90012

Action Filed: April 30, 2018

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on September 24, 2018, at 10:00 a.m., or as
3 soon thereafter as the matter may be heard in Courtroom 10C, located at the United
4 States District Court, 350 West 1st Street, Los Angeles, California 90012, the
5 Honorable S. James Otero presiding, Defendant Donald J. Trump will move and
6 hereby does move to dismiss Plaintiff's Complaint pursuant to Tex. Civ. Practice &
7 Rem. Code § 27.001 *et seq.*, or alternatively, to strike the Complaint pursuant to
8 California Code of Civil Procedure section 425.15 *et seq.*, or alternatively, to dismiss
9 the Complaint pursuant to Federal Rules of Civil Procedure ("FRCP") Rule 12(b)(6).

10 This Motion shall be based on this Notice of Motion and Motion, the
11 accompanying Memorandum of Points and Authorities and Declaration of
12 Charles J. Harder, the anticipated reply papers, all materials that may be properly
13 considered in connection with this motion, and oral argument at the hearing.

14 Pursuant to Local Rule 7-3, the parties met and conferred regarding this motion
15 on August 20, 2018, and again on August 23, 2018.

16
17 Dated: August 27, 2018

HARDER LLP

18
19 By: /s/ Charles J. Harder

CHARLES J. HARDER

Attorneys for Defendant

DONALD J. TRUMP

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff's Complaint is a classic SLAPP or "Strategic Lawsuit Against Public Participation." Plaintiff Stephanie Clifford ("Plaintiff"), also known by her stage name, "Stormy Daniels," is a famous adult film star and exotic dancer who created (with her lawyer, Michael Avenatti, acting on her behalf) a highly publicized dispute with the President of the United States, Defendant Donald J. Trump. In March 2018, during the course of publicizing her dispute with the President, Plaintiff—for the first time in seven years—made the claim that someone in 2011 (without specifying the date, week or even month), whom she assumes was acting on behalf of Mr. Trump, threatened her on a street in Las Vegas, Nevada. President Trump tweeted his utter disbelief of Plaintiff's claim. Plaintiff, claiming to be upset and harmed by the tweet, sued him in this action.

Plaintiff's suit is barred by numerous defamation doctrines.

First, the President's tweet is a protected opinion. Politicians, in the course of public debate, are entitled to enter the debate and express their beliefs, including their disbeliefs, of the claims of their adversaries. Plaintiff is a vocal adversary of the President; she and her lawyer, Mr. Avenatti, acting on her behalf, have publicly attacked the President in more than 140 television news appearances in the past five months. Mr. Avenatti feels his attacks on the President (while acting on Plaintiff's behalf) have been so effective that he now is exploring a run for Presidency of the United States himself.

Second, Plaintiff has not pleaded and cannot prove that she suffered any damages as a result of the tweet. Plaintiff has capitalized on her dispute with the President, embarking on a nationwide tour of adult live entertainment venues (a.k.a., strip clubs) for which she admittedly is being paid at least four times her normal appearance fee because of her public controversy with the President. Her publicity campaign against the President has included an appearance on *60 Minutes* that

1 reportedly was watched by 22 million people, an appearance on *The View*, a national
2 television news program, and an appearance on *Saturday Night Live*—poking fun at
3 her public dispute with the President. These appearances have generated massive
4 publicity for Plaintiff, which in turn has generated sizeable audiences for her “Make
5 America Horny Again” tour of strip clubs throughout America. Even the name of her
6 tour is an obvious parody of the President’s successful campaign slogan, designed to
7 further generate interest in, and audiences for, her strip club appearances. Plaintiff is
8 making money—not suffering economic harm—as a result of her disputes with the
9 President, and her heavy promotion of her claim that an alleged unidentified man
10 supposedly threatened her on some day in 2011 (which she discussed in her
11 appearances on *60 Minutes* and *The View*) is a major part of her publicity campaign
12 attacking the President, touring strip clubs, and generating profits to her.

13 Third, Plaintiff is a clear public figure. As such, she is required to plead and
14 prove actual malice, *i.e.*, that the President had reckless disregard for the truth when
15 he tweeted his expression of disbelief about her story regarding an alleged
16 unidentified man who supposedly threatened her on some day in 2011—an alleged
17 act that Plaintiff has never reported to law enforcement: not in 2011, nor in 2018, nor
18 at any other time. The Complaint fails to adequately plead actual malice, and
19 Plaintiff cannot prove it with any evidence, because there was no reckless disregard.

20 This suit (and its companion suit filed on March 6, 2018, pending in the same
21 Court), is nothing more than a public relations move by Plaintiff and her outspoken
22 lawyer to obtain still more publicity and attention. This suit improperly injects the
23 United States courts into what is effectively a public debate involving a major
24 politician and one (or two) of his public antagonists. This suit is designed to chill the
25 President’s free speech rights on matters of public concern. Accordingly, the Court
26 should grant this special motion to dismiss the Complaint and award reasonable
27 attorneys’ fees to Mr. Trump. In the alternative, the Court should dismiss the
28 Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

II. STATEMENT OF FACTS

Plaintiff is a Texas resident. [Complaint, ¶ 1.] She is a well-known adult film star with over 150 film credits, including titles such as *Dripping Wet Sex 4*, *Spreading My Seed*, *Young & Anal*, *Love In An Elevator*, *Pussy Sweat*, *Porking With Pride 2* and *Toxxxic Cumloads 6*. [Declaration of Charles J. Harder (“Harder Decl.”), Ex. A, Stormy Daniels’ IMDB page.]

Plaintiff claims that in 2006 she engaged in adultery by having an intimate encounter with Mr. Trump, ten years before he became President—an allegation he has denied. [Complaint, ¶ 5.]

The President resides and works at The White House in Washington, D.C., and did so at the time of sending the tweet in question.¹ (The Complaint incorrectly alleges that he lives in New York.)

As the Court is aware, Plaintiff’s claim of an intimate encounter in 2006, which she made public in March 2018, gave rise to a related case currently pending in this Court: *Clifford v. Trump*, No. 2:18-CV-02217 (the “Related Case”). Coinciding with her filing of the Related Case, Plaintiff embarked on an extensive publicity campaign which has included appearances on *60 Minutes*, *The View*, *Saturday Night Live*, and press conferences outside of U.S. courthouses, as well as widespread television news appearances and press conferences by her litigation counsel, Michael Avenatti, amplifying her claims. [Harder Decl., Ex. B, *60 Minutes* transcript; Ex. C, *The View* transcript; Ex. D, *Saturday Night Live* transcript; Ex. E, Chart of Interviews.] Mr. Avenatti has parlayed his newfound fame into recent public statements that he is exploring a run for President of the United States in 2020, to unseat President Trump, and has made political appearances in Iowa and New Hampshire (the states of the first primary and caucus), and even released a statement

¹ The fact that the President lives and works at the White House is judicially noticeable under Fed. R. Evid. 201(b)(1).

1 of his political policy positions. [Harder Decl., Ex. F, Avenatti Tweet; Ex. G,
 2 Avenatti Policy Positions; Ex. H, Des Moines Register article regarding Avenatti's
 3 Iowa political appearance; Ex. I, *Time* magazine article regarding Avenatti's New
 4 Hampshire political appearance; *see also*, television interview of Avenatti regarding
 5 his presidential campaign ambitions at [https://www.nbcnews.com/ video/michael-
 6 avenatti-visits-iowa-state-fair-contemplates-presidential-run-
 7 1298423363691?v=raila](https://www.nbcnews.com/video/michael-avenatti-visits-iowa-state-fair-contemplates-presidential-run-1298423363691?v=raila).]

8 Plaintiff has embarked on a tour of appearances at strip clubs around the
 9 country, including Los Angeles, New York, Tampa, Myrtle Beach, Atlanta, and St.
 10 Louis, calling it the "Make America Horny Again" tour. [Harder Decl., Ex. J,
 11 Appearance Schedules.]

12 In her *60 Minutes* interview, aired March 25, 2018 and reportedly watched by
 13 22 million viewers, and subsequently during her interview on *The View* on April 17,
 14 2018, Plaintiff claimed that sometime in 2011 (without specifying the date, week or
 15 even month), she was approached by an unidentified stranger in a parking lot in Las
 16 Vegas, Nevada when she was with her infant daughter. [Harder Decl., Exs. B-C.]
 17 The stranger allegedly told her to "leave Trump alone" and "forget the story," and
 18 said that her daughter was beautiful and that it would be a shame if something
 19 happened to her mother. [*Id.*] Plaintiff implied that the alleged threat came from
 20 somewhere in the Trump organization. [*Id.*] Mr. Avenatti, acting on Plaintiff's
 21 behalf, has repeated this charge in television appearances attacking the President.
 22 [*See e.g.* Harder Decl., Exhibit C; Exhibit K, Interview Transcript; Exhibit M, *infra.*]

23 President Trump, faced with Plaintiff and her lawyer making numerous public
 24 attacks against him, including charging him with ordering threats to be made against
 25 Plaintiff in 2011, responded to this explosive allegation in the tweet that gave rise to
 26 this suit.

27 As part of her television appearances on *60 Minutes* and *The View* announcing
 28 for this first time this alleged thug encounter supposedly from seven years earlier,

1 Plaintiff (or her attorney, Mr. Avenatti, acting on her behalf) hired a professional
2 sketch artist to draw a picture of the alleged man whom she claims threatened her.
3 [Complaint, ¶ 15; *see also*, Harder Decl., Ex. L, Avenatti Tweet.]

4 An unrelated twitter user then posted a satirical tweet remarking on the
5 uncanny resemblance of the alleged man in the sketch to Plaintiff's estranged
6 husband, placing within the tweet a side-by-side of the sketch with a photograph of
7 Plaintiff's estranged husband. [Complaint, ¶ 16.] President Trump responded to that
8 tweet by replying to the third party tweet, commenting on the credibility of Plaintiff's
9 allegations about the alleged man in 2011 who supposedly threatened her: "A sketch
10 years later about a nonexistent man. A total con job, playing the Fake News Media
11 for Fools (but they know it)!" (hereinafter the "Comment") [*Id.*, ¶ 15.]

12 Plaintiff's litigation counsel, Mr. Avenatti, reacted to the Comment on CNN by
13 calling it "another gift from the heavens." [Harder Decl., Ex. M, Interview
14 Transcript.] However, Plaintiff and Mr. Avenatti apparently changed their minds and
15 decided instead to allege that the Comment was highly damaging, and then filed the
16 instant lawsuit.

17 Regarding facts relating to Plaintiff's damages allegations, the Complaint
18 alleges that the Comment was defamatory *per se* because it (allegedly) accused
19 Plaintiff of a serious crime, *i.e.*, that she falsely accused an individual of threatening
20 her. [Complaint, ¶ 19.] The Complaint does not state a legal basis for how it could
21 be a criminal act for Plaintiff to falsely state on television that she received a threat
22 from an unidentified man seven years earlier. The Complaint also does not identify
23 what law such an act supposedly would violate, or how such law could be violated
24 under these alleged facts.

25 The Complaint further alleges that Plaintiff would be subjected to threats of
26 violence and economic harm as a result of the Comment, and that she has retained
27 *extra* private security as a result of threats she has received. [Complaint, ¶¶ 35-36.]
28 However, the Complaint does not allege that any such threats are specifically

1 connected to the Comment, as compared with the private security she presumably
 2 hired related to the preexisting public controversy—which she and her lawyer created
 3 and have fueled—arising from her claims that she committed adultery by allegedly
 4 having a romantic encounter with Mr. Trump in 2006,² and/or the massive attack
 5 campaign by Mr. Avenatti (acting on her behalf) against the President, which
 6 commenced more than a month prior to the Comment and has continued for months
 7 after the Comment.

8 The Complaint also does not specify any economic harm that Plaintiff
 9 allegedly has suffered as a result of the Comment (only), as opposed to the many
 10 other aspects of her public attack campaign against the President.

11 Shortly after filing the Related Case, Plaintiff made appearances at various
 12 adult entertainment clubs and boasted that her pay had “quadrupled” because of the
 13 publicity from her accusations against the President. [Harder Decl., Exhs. P-Q.]
 14 Plaintiff’s professional website even touts her campaign against the President to
 15 entice people to purchase a membership at her site, stating: “AS SEEN ON 60
 16 MINUTES!!”. [*Id.*, Ex. R, Official Site of Stormy Daniels.] Plaintiff also has used
 17 _____

18 ² Plaintiff herself denied on six different occasions—in 2006, 2011, 2016, 2017 and
 19 twice in writing in January 2018—that she and Mr. Trump ever had a romantic
 20 encounter. For example, on January 10, 2018, Plaintiff issued a signed written
 21 statement **expressly denying** that she had any form sexual or romantic affair with Mr.
 22 Trump (the “January 10, 2018 Written Denial”). [Harder Decl., Ex. N, ¶ 5.] Twenty
 23 days later, on January 30, 2018, Plaintiff issued a second signed written statement
 24 titled “Official Statement of Stormy Daniels” wherein she again **expressly denied**
 25 having any sexual relationship with Mr. Trump (the “January 30, 2018 Written
 26 Denial”) (collectively, with the January 10, 2018 Written Denial, the “Written
 27 Denials”). [*Id.*, Ex. N, ¶ 6.] The Written Denials are consistent with an earlier denial
 28 made by Plaintiff in October 2011, when she told E! News that a story claiming that
 she and Mr. Trump had an affair was “bulls--t.” [*Id.*, Ex. O.] In the January 30, 2018
 Written Denial, Plaintiff states that she also publicly denied the affair in 2006, 2016
 and 2017. Thus, Plaintiff has expressly denied having any affair with Mr. Trump on
 at least six (6) occasions, including the Written Denials in 2018, and the additional
 denials in 2006, 2011, 2016 and 2017.

her dispute with President Trump to promote her strip club appearances through her Instagram account. [*Id.*, Ex. S, Instagram Promotions.]

III. ARGUMENT

A. This Action Is Governed By Texas Law

Because this action was transferred from New York, New York conflicts principles apply to determine which substantive law to applies to this action. *Sarver v. Chartier*, 813 F.3d 891, 897 (9th Cir. 2016). Under New York conflicts principles, the law of the situs of the injury applies to a tort suit. *Locke v. Aston*, 814 N.Y.S.2d 38, 42 (N.Y.A.D. 2006) (“Under New York’s choice of law rules, where the plaintiff and defendant are domiciled in different states, the applicable law in an action where civil remedies are sought for tortious conduct is that of the situs of the injury.”); *Sondik v. Kimmel*, 16 N.Y.S.3d 296, 298 (N.Y.A.D. 2015) (New York law applied to suit for privacy invasion against Jimmy Kimmel television show even though video was edited in California, because the injury to the plaintiff, who is domiciled in New York, happened in New York).

In *Condit v. Dunne*, 317 F. Supp. 344, 355 (S.D.N.Y. 2004), a true crime author made allegedly defamatory statements on the Larry King television show and the Laura Ingraham national radio show, of and concerning a former Congressman living in California. The court held that California law applied to these defamatory comments. *Cf. Restatement (Second) Conflicts of Law* § 150 cmt. e (“Rules of defamation are designed to protect a person’s interest in his reputation. When there has been publication in two or more states of an aggregate communication claimed to be defamatory, at least most issues involving the tort should be determined ... by the local law of the state where the plaintiff has suffered the greatest injury by reason of his loss of reputation. **This will usually be the state of the plaintiff’s domicile....**”) (emphasis added); *Calder v. Jones*, 465 U.S. 783, 788-89 (1984) (California courts had personal jurisdiction over defendant who published defamatory statement of and concerning California resident, because the injury was suffered in California).

1 Here, Plaintiff alleges in the Complaint that she is a Texas resident. Whatever
 2 personal injuries she claims to have suffered as a result of the Comment therefore
 3 occurred in Texas, where she is domiciled. Texas law therefore applies to this
 4 action.³

5 **B. The Texas Anti-SLAPP Statute Applies to This Action**

6 The Texas anti-SLAPP statute, Tex. Civ. Prac. & Rem. Code § 27.001 *et seq.*,
 7 applies to any “[e]xercise of the right to free speech,” which in turn means “a
 8 communication made in connection with a matter of public concern.” *Id.* §
 9 27.001(3). A “matter of public concern” includes an issue related to a public official.
 10 *Id.* § 27.001(7)(D).

11 The anti-SLAPP statute provides for a party to file a special motion to dismiss
 12 a covered Complaint. Tex. Civ. Prac. & Rem. Code § 27.003(a). “In determining
 13 whether a legal action should be dismissed under this chapter, the court shall consider
 14 the pleadings and supporting and opposing affidavits stating the facts on which the
 15 liability or defense is based.” *Id.* § 27.006(a). The Court must dismiss the action
 16 unless “clear and specific evidence [establishes] a prima facie case for each essential
 17 element of the claim in question”. *Id.* § 27.005(c).

18 In the case at bar, it cannot seriously be disputed that the Comment was a
 19 communication in connection with a matter of public concern. Plaintiff appeared on
 20 *60 Minutes* to voice her allegations against the President of the United States,
 21 including her allegation of an alleged threat in 2011, and a reported 22 million people
 22 tuned in to watch her. Plaintiff subsequently appeared on *The View* to release the
 23 sketch of the alleged man who supposedly threatened her, and Plaintiff’s attorney
 24 made numerous more television appearances, discussing the same allegation. [Harder
 25 _____]

26 ³ In the event the Court applies California law, the result is the same. *See infra*,
 27 Section IV, for a brief discussion of California’s anti-SLAPP law and its application
 28 warranting the striking of the Complaint and award of reasonable attorneys’ fees to
 Mr. Trump.

Decl., Exhs. C, K, M.] The Comment was the President’s expression of his disbelief of Plaintiff’s allegation. Thus, the Complaint concerns President Trump’s exercise of his right to free speech, and the Complaint therefore is subject to a motion to dismiss unless **clear and specific evidence** is presented by Plaintiff in her opposition to this Motion, to support each of the essential elements of Plaintiff’s defamation claim. Tex. Civ. Prac. & Rem. Code § 27.001(7)(D).

C. The Comment Expresses a Constitutionally-Protected Opinion

The Comment expresses a constitutionally-protected opinion regarding the credibility of Plaintiff’s allegation that she received a threat seven years earlier by an unnamed person. The Comment responded to Plaintiff’s implicit charge that the alleged man who supposedly threatened her was acting on behalf of Mr. Trump. Mr. Trump’s response was essentially that he strongly doubted the veracity of Plaintiff’s accusation. This is a classic constitutionally-protected opinion.

“However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

Texas defamation law supplies robust protection for opinions. The Texas Supreme Court recently held: “[S]tatements that are not verifiable as false cannot form the basis of a defamation claim....And even when a statement is verifiable as false, it does not give rise to liability if the entire context in which it was made discloses that it is merely an opinion masquerading as fact.” *Dallas Morning News, Inc. v. Tatum*, 2018 WL 2182625 at *16 (Tex. May 11, 2018) (internal quotations omitted). In *Tatum*, the newspaper ran a commentary that mentioned an obituary placed in the newspaper by the plaintiffs which allegedly underplayed the decedent’s mental illness (which resulted in a suicide), and stated this was an example of how society underplays mental illnesses and this can lead to tragedy. The plaintiffs sued, alleging this was defamatory because it implied they published a deceptive obituary. The Court held this was not actionable, because the columnist “did not imply that he

1 had personal knowledge that any of the facts the Tatums assert were false.” *Id.* at *17.

2 *Tatum* controls this case. Here, the Comment nowhere implies that President
3 Trump has any special information or insight as to what did or did not happen in a
4 Las Vegas parking lot in 2011. Rather, he gives an opinion that he does not find
5 Plaintiff’s account credible. This is constitutionally-protected and therefore non-
6 actionable, especially because the Comment arose from a public dispute between a
7 major politician and one of his adversaries.

8 It does not matter that the President used strident language (“nonexistent,”
9 “con job,” and “fake news”) in expressing his opinion doubting the veracity of
10 Plaintiff’s allegation rather than using more genteel terminology. Rhetorical
11 hyperbole is not actionable as defamation. *Neely v. Wilson*, 418 S.W.3d 52, 83-84
12 (Tex. 2013). Courts throughout the United States have routinely held that
13 terminology similar to that used by the President is constitutionally protected opinion
14 and non-actionable. *See e.g., McCabe v. Rattiner*, 814 F.2d 839, 843 (1st Cir. 1987)
15 (“scam” not defamatory); *Oilman v. Evans*, 750 F.2d 970, 987 (D.C. Cir. 1984) (*en*
16 *banc*) (political columnist labeling a political figure a “Marxist” not defamatory);
17 *Letter Carriers v. Austin*, 418 U.S. 264, 282-83 (1974) (use of term “scab” in labor
18 dispute not defamatory); *Buckley v. Littell*, 539 F.2d 882, 893-94 (2d Cir. 1976)
19 (labeling political writer a “fascist” not defamatory); *Greene v. State*, 21 So.3d 348,
20 352 (La. App. 2009) (labeling state employee “pathological liar” not actionable).

21 Any finding by the Court that the Comment has a defamatory meaning and is
22 not protected opinion could have a chilling effect on political debate throughout the
23 United States forever. Politicians frequently express their opinions about their
24 political adversaries, often in strident and blunt terms. In 1964, for instance, Lyndon
25 Johnson ran an advertisement that implied his opponent, Barry Goldwater, would
26 start a nuclear war. John Kennedy campaigned against incumbent Vice President
27 Richard Nixon in 1960 based on claims of a “missile gap” with the Soviet Union that
28 turned out to be grossly misleading. Bill Clinton allegedly misstated the budget

1 deficit in his 1992 campaign against George H.W. Bush. None of these statements
2 were anything more than opinions, and none could or should form the basis of a
3 defamation suit.

4 Indeed, since the founding of our republic, politicians have often expressed
5 their opinions by branding their opponents as “liars.” Doing so does not subject
6 every such politician to a defamation claim. President Trump himself has expressed
7 his opinions regarding multiple adversaries, sometimes referring to his opponents by
8 colorful names such as “Lyn’ Ted” and “Crooked Hillary.” A defamation standard
9 that turns typical political rhetoric into actionable defamation would chill expression
10 that is central to the First Amendment and political speech.

11 **D. Independently, Plaintiff Cannot Establish She Suffered Any**
12 **Damages**

13 Texas has a defamation *per se* doctrine that is limited to statements that “(1)
14 unambiguously charge a crime, dishonesty, fraud, rascality, or general depravity or
15 (2) are falsehoods that injure one in his office, business, profession, or occupation”.
16 *KTRK Television, Inc. v. Robinson*, 409 S.W.3d 682, 690 (Tex. App. 2013). Under
17 that standard, the Comment is not defamatory *per se*. It does not “unambiguously”
18 charge a crime, dishonesty, fraud, rascality, or general depravity and clearly does not
19 injure Plaintiff in her office, business, profession, or occupation.

20 Texas law is clear that merely stating that someone has made a false statement
21 is **not** defamation *per se*. In *Hancock v. Variyam*, 400 S.W.3d 59, 67 (Tex. 2013),
22 the Texas Supreme Court held that statements that the plaintiff lacked veracity and
23 dealt in half-truths were not defamatory *per se*, because they did not injure the
24 plaintiff in his vocation as a physician. Similarly, there is nothing about Plaintiff’s
25 career as an adult entertainer that requires a reputation for honesty. Importantly,
26 Plaintiff has denied six times—in 2006, 2011, 2016, 2017 and 2018 (twice in
27 writing)—that she ever had a romantic encounter with Mr. Trump, only to then claim
28 that her denials were false in March 2018 (a reversal that quadrupled her appearance

1 fees). (*See supra*, note 2.) If Plaintiff has acquired a reputation for dishonesty, it
 2 would have occurred starting in March 2018, weeks before the Comment.⁴

3 The only pleaded ground for defamation *per se* in the Complaint is that the
 4 Comment accuses Plaintiff of the so-called crime of making a false accusation of
 5 criminal activity against someone. However, Plaintiff never reported the alleged
 6 incident to law enforcement, which is a required element of the crime of falsely
 7 reporting criminal activity. *See Nev. Rev. Stat. § 287.280* (“Every person who
 8 deliberately reports to any police officer, sheriff, district attorney, deputy sheriff,
 9 deputy district attorney or member of the Department of Public Safety that a felony
 10 or misdemeanor has been committed, which causes a law enforcement agency to
 11 conduct a criminal or internal investigation, knowing such report to be false, is guilty
 12 of a misdemeanor.”) Moreover, Plaintiff never named the alleged person who
 13 allegedly threatened her. Also, President Trump did not claim in his tweet that
 14 Plaintiff violated any law by claiming on two television news shows that she was
 15 threatened; he simply opined that he did not find her claim credible.

16 Accordingly, because defamation *per se* does not apply, Plaintiff must plead
 17 and prove **actual damages** to recover for defamation. *Robinson*, 409 S.W.3d at 689
 18 (“Defamation claims are divided into two categories—defamation *per se* and
 19 defamation *per quod*—according to the level of proof required to make them
 20 actionable....Statements that are defamatory *per quod* are actionable only upon
 21 **allegation and proof of damages.**”) (Emphasis added.)
 22
 23

24 ⁴ The use of the term “dishonesty” in the Texas defamation *per se* standard
 25 must be read narrowly in light of the Texas Supreme Court’s recent holding in
 26 *Hancock*, which held that statements that implied the plaintiff in that case was being
 27 dishonest were insufficient to constitute defamation *per se*. The Comment here is
 28 analogous to the statements in *Hancock* that were held to not constitute defamation
per se, especially since Plaintiff, like the plaintiff in *Hancock*, does not practice a
 trade or profession where a reputation for honesty is essential.

1 Plaintiff has not alleged actual damages. Her only allegations of damages are
2 (1) the hiring of “extra” security guards and (2) a general allegation that she lost
3 unspecified business opportunities as a result of the Comment.

4 With respect to (1), she cannot establish a causal relationship between the
5 hiring of “extra” private security and the publication of the Comment. She has been
6 embroiled in a public dispute with the President which she herself created and has
7 continued to fuel—with the help of her lawyer, who has made more than 140 national
8 television appearances and apparently feels his over-the-top public animosity and
9 aggressive speech toward the President for the past five months qualifies him to run
10 for and become President himself. There is no reason to connect any threats that
11 Plaintiff allegedly has received in 2018 that require the hiring of *additional* private
12 security guards to the specific Comment, rather than being attributable to the fact that
13 Plaintiff (herself and through her lawyer) picked a public fight with a President who
14 has many passionate supporters.

15 Importantly, shortly **before** the President sent the tweet containing the
16 Comment, Mr. Avenatti stated on *The View* (appearing with his client, the Plaintiff):
17 “If we read emails, if we just randomly picked 100 emails a day that her and I get and
18 we read them—first of all, we could not read them on network television. They’re so
19 bad. **They’re so threatening and over the top. There’s a lot of crazy people out**
20 **there.**” [Harder Decl., Ex. C (emphasis added).] This was Mr. Avenatti’s description
21 of Plaintiff’s security situation shortly **before** the tweet in question was sent.
22 Plaintiff and Mr. Avenatti also have continued their publicity campaign attacking the
23 President after the tweet was sent. It would be impossible to determine which private
24 security was required for Plaintiff to address **pre-Comment** activities, versus private
25 security to address activity attributable **only** to the Comment itself, versus private
26 security to address activities attributable to Plaintiff’s and Mr. Avenatti’s attacks
27 against the President **after** the Comment.

1 With respect to (2), the evidence fairly shows that Plaintiff has benefitted from
 2 the public controversies that she created, including the Comment which responded to
 3 Plaintiff's allegation of an alleged threat by an alleged unidentified man seven years
 4 earlier, which Plaintiff raised for the first time in 2018 during her two major
 5 television appearances: on *60 Minutes* and *The View*. Her lawyer, Mr. Avenatti, even
 6 referred to the Comment as a "gift from the heavens."⁵ Plaintiff has capitalized on
 7 her public notoriety, achieved because of her allegation of having had a romantic
 8 encounter with Mr. Trump in 2006 (which she denied publicly six times, and he also
 9 has denied), her two lawsuits filed against the him (the Related Action and then this
 10 action), and her massive publicity campaign of all of it, tied to her "Make America
 11 Horny Again" tour of strip clubs throughout the country. Plaintiff has not alleged
 12 any specific lost business or reputational damage as a result of the Comment,
 13 presumably because there is none.

14 **E. Plaintiff Cannot Show Actual Malice**

15 Plaintiff is a public figure. She was already an adult film star with **more than**
 16 **150 film credits**, and then her allegations against the President made her a household
 17 name. "In some instances an individual may achieve such pervasive fame or
 18 notoriety that he becomes a public figure for all purposes and in all contexts." *Gertz*,
 19 *supra*, 418 U.S. at 351.

20 At the very least, Plaintiff is a limited purpose public figure with respect to the
 21 issue of her allegations against the President. She voluntarily injected herself into the
 22 public debate about President Trump in an attempt to influence that debate, and also
 23 to advance her own career and income. *Gertz, supra*, 418 U.S. at 351. She did this
 24 through multiple national television appearances, social media posts, and press
 25 _____

26 ⁵ Notably, Mr. Avenatti did not seek a timely retraction, which is a prerequisite
 27 for a defamation action under Texas law pursuant to Tex. Civ. Prac. & Rem. Code §
 28 73.055, presumably because he saw the Comment as a "gift from the heavens" rather
 than a defamatory statement of and concerning his client.

1 conference appearances, as well as more than 140 national television news
2 appearances and press conferences by her lawyer, Mr. Avenatti. Plaintiff's actions
3 (both her own and those of her lawyer, acting on her behalf), make her a limited
4 purpose public figure, at the very least.

5 As a public figure, Plaintiff must show that the alleged defamatory statement in
6 the Comment was made by the President with reckless disregard for the truth. *Gertz*,
7 *supra*, at 342. Plaintiff cannot show this.

8 Plaintiff's only allegations in the Complaint on the issue of actual malice are
9 that (1) any threat against her in 2011 must have come from Mr. Trump or his then
10 lawyer, Michael Cohen, and/or that (2) Mr. Trump acted with actual malice (reckless
11 disregard for the truth) because he did not know whether anyone had threatened
12 Plaintiff in 2011.

13 Theory number (1) does not prove actual malice because the Complaint pleads
14 that there were a number of other people who knew about Plaintiff's allegations of an
15 affair in 2011, including Plaintiff's estranged husband, and *In Touch* magazine.
16 [Complaint, ¶6.] Thus, a threat, if one occurred, could have come from any number
17 of other sources other than Mr. Trump or Mr. Cohen. [*See also*, Harder Decl.,
18 Exhibit K.]

19 Theory number (2) does not prove actual malice because the standard requires
20 conscious disregard of actual evidence that the statement is false, *i.e.*, that President
21 Trump, at the time he tweeted the Comment, entertained "serious doubts" about the
22 veracity of his statement, that is, a "high degree of awareness" that his Comment was
23 probably false. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Plaintiff cannot
24 show this, and the Complaint fails to even allege this—it merely pleads that President
25 Trump said something without knowing whether it was true or not. This is not the
26 standard for actual malice. Absent competent evidence that President Trump was
27 actually aware that his Comment was false or had information that would cause him
28 to entertain serious doubts about its truth, Plaintiff cannot prove actual malice. She

1 certainly has not adequately pled actual malice in the Complaint.

2 **F. President Trump Is Entitled to An Award of His Reasonable**
 3 **Attorney's Fees.**

4 A prevailing defendant who obtains dismissal of a SLAPP suit is entitled to an
 5 award of his reasonable attorney's fees. Tex. Civ. Prac. & Rem. Code § 27.009(a)(1).
 6 Here, this case is an obvious SLAPP. Plaintiff filed the claim despite not having
 7 suffered any damages, based on a tweet by a major politician whom she publicly
 8 opposes (and whom her lawyer is preparing to run against in 2020), which expressed
 9 a constitutionally-protected opinion doubting the veracity of her claim, which she
 10 raised for the first time in 2018 regarding an alleged threat she received one day in
 11 2011 (without identifying the actual date, week or even month), by an alleged person
 12 whom she has no identifying information other than the fact that he looks
 13 substantially similar to her estranged husband. Moreover, Plaintiff did not report this
 14 alleged threat to police—not in 2011, nor in 2018, nor at any other time. Also,
 15 Plaintiff's announcement of this alleged threat came at a time when she was seeking
 16 to escalate her public war with the President—after having just filed a civil lawsuit
 17 against him, and while her lawyer, acting on her behalf, had already made more than
 18 100 national television interviews attacking the President.

19 Plaintiff filed this suit to try to chill the President's ability to respond to her
 20 and her lawyer's attacks—speech protected by the First Amendment.

21 This is exactly the sort of litigation that anti-SLAPP laws were enacted to
 22 prevent. President Trump is entitled to dismissal and an award of attorney's fees.

23 **IV. ALTERNATIVELY, THE COURT SHOULD STRIKE THE**
 24 **COMPLAINT PURSUANT TO CALIFORNIA'S ANTI-SLAPP**
 25 **STATUTE**

26 Should the Court apply California's anti-SLAPP statute, Cal. Code Civ. Proc. §
 27 425.16, the result would be the same. California's statute is substantially congruent
 28 to Texas' statute, allowing a special motion to strike any causes of action arising

1 from acts in furtherance of the defendant’s right to free speech in connection with a
 2 public issue. *Id.* § 425.16(b)(1). The plaintiff must show, in response to such a
 3 motion, a probability that she will prevail on the claim. *Id.* A prevailing defendant
 4 on a motion under Section 425.16 is entitled to an award of attorney’s fees. *Id.* §
 5 425.16(c)(1).

6 Under California law, the Comment is protected, non-actionable opinion.
 7 *Gregory v. McDonnell-Douglas Corp.*, 17 Cal. 3d 596, 603 (1976) (employer’s
 8 statements that union officials were sacrificing the interests of their membership for
 9 their own personal gain were protected opinion).

10 The Comment is also not defamatory *per se*, because its alleged defamatory
 11 meaning requires reference to extrinsic facts (*i.e.*, whether or not anyone threatened
 12 Plaintiff and whether or not the President had anything to do with such a threat if it
 13 occurred). Cal. Civ. Code § 45a (where extrinsic facts are necessary to prove
 14 defamatory meaning, statement is not defamatory *per se*). Accordingly, special
 15 damages must be pleaded and proved. *Id.* As set forth above, Plaintiff has not and
 16 cannot do so.

17 Finally, Plaintiff cannot plead and prove actual malice, a federal constitutional
 18 requirement for defamation claims asserted by public figures, for the reasons stated
 19 above. Thus, Plaintiff cannot show any probability that she will prevail on her claim,
 20 and Section 425.16 requires that it be stricken and that attorney’s fees be awarded to
 21 the President—if California law applies.

22 **V. ALTERNATIVELY, THE COURT SHOULD DISMISS THE**
 23 **COMPLAINT PURSUANT TO FRCP 12(b)(6)**

24 The Court may dismiss a complaint that fails to state a claim upon which relief
 25 can be granted. Fed. R. Civ. P., Rule 12(b)(6). In analyzing a motion to dismiss, the
 26 complaint must contain “enough facts to state a claim to relief that is plausible on its
 27 face” and “raise [that] right to relief above the speculative level.” *Bell Atl. Corp. v.*
 28 *Twombly*, 550 U.S. 544, 555, 570 (2007). A plaintiff’s claim meets the plausibility

1 threshold when he “pleads factual content that allows the court to draw [a] reasonable
2 inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*,
3 556 U.S. 662 (2009) (internal quotations omitted).

4 If the Court finds that Texas’ anti-SLAPP statute somehow does not apply, nor
5 does California’s, the Court nevertheless should dismiss the Complaint because
6 Plaintiff has not pled, and will never be able to plead, a valid claim for defamation.
7 For the reasons stated herein, Plaintiff has no viable claim against President Trump
8 as a matter of law.

9 Further, because any amendment would be futile, the Court should dismiss the
10 Complaint with prejudice. *Gabrielson v. Montgomery Ward & Co.*, 785 F.2d 762,
11 766 (9th Cir. 1986).

12 **VI. CONCLUSION**

13 For the foregoing reasons, the motion to dismiss under Tex. Civ. Prac. & Rem.
14 Code § 27.001 *et seq.* should be granted and President Trump should be awarded his
15 attorney’s fees, or in the alternative, the Complaint should be stricken under Cal.
16 Code Civ. Proc. § 425.16, or in the further alternative, the Complaint should be
17 dismissed pursuant to FRCP 12(b)(6).

18
19 Dated: August 27, 2018

HARDER LLP

20
21 By: /s/ Charles J. Harder

CHARLES J. HARDER

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DONALD J. TRUMP